Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1828

FELIX POLLUTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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No. .....

FELIX POLLUTRO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Felix Pollutro, by Francis X. Murphy, his attorney, for his petition for writ of certiorari respectfully shows

1. The opinion in the court below is not reported. A copy of the opinion is appended to this petition.

2. Judgment was dated and entered in the United States Court of Claims on January 23, 1976 dismissing Petitioner's Claim on motion of United States of America upon the ground that the statute of limitations barred the action. Petitioner made a timely motion for rehearing on February 6, 1976. On March 26, 1976 an order was made and entered denying the motion for rehearing. This Petition is filed within 90 days after entry of the order denying rehearing. Jurisdiction to review the order and judgment by writ of certiorari is conferred by 28 U.S.C. 1255.

3. Petitioner, a non probationary U.S. Civil Service employee of the Internal Revenue Service was discharged for dishonesty in 1949 without a hearing. On May 15, 1974 he was afforded a hearing. The record of that hearing and his employment record were referred to a departmental hearing examiner. On September 24, 1974 an administrative determination was made deciding the matter on its merits. That

determination is embodied in a letter dated September 24, 1974 to congressman Jack Kemp who had been instrumental in securing that hearing along with Petitioner's son. That determination was that the initial discharge was correct. The question was decided on the merits by the administrative agency and not on the ground of the statute of limitations. A copy of that September 24, 1974 determination is annexed hereto.

On March 3, 1975 Claim was filed in the Court of Claims. The questions for review are two:

(1) Could the court below, sitting in review of that administrative determination, decide the matter on the basis of the statute of limitations when the administrative agency had decided the question on its merits?

(2) Whether claim for wrongful discharge accrued in 1949 when Petitioner was discharged or on September 24, 1974 when he exhausted his administrative remedies?

4. The constitutional provisions and statutes involved are:

Amendment 5 of the U.S. Constitution which in pertinent part reads:

> "No person shall be . . . deprived of life, liberty or property, without due process of law"

5 U.S.C. 7501 which provides:

> "a. An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.
>
> b. An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to
>
> (1) notice of the action sought and of any charges preferred against him;
>
> (2) a copy of the charges;

> (3) a reasonable time for filing a written answer to the charges, with affidavits; and
>
> (4) a written decision on the answer at the earliest practicable date.
>
> Examination of witnesses, trial or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and on request shall be furnished to the individual affected and to the Civil Service Commission.
>
> c. This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title."

28 U.S.C. 2501

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim accrues."

5. On January 28, 1949 petitioner was suspended from employment by Internal Revenue Service. On July 8, 1949, he was discharged. He was indicted March 15, 1949 for the same conduct. He was acquitted in December 1949 on trial of the indictment. He applied for reinstatement to Internal Revenue Service. For 25 years he tried to obtain a hearing. Finally one was afforded him on May 15, 1974. The record was submitted to an experienced hearing examiner. On September 24, 1974 a written determination was made adhering to the original discharge. Action was filed in the Court of Claims on March 3, 1975.

6. Jurisdiction of the U.S. Court of Claims rested on the fact that the Claim did not accrue until plaintiff had exhausted his administrative remedies and that did not occur until the determination of September 24, 1974. The action sought

money damages for wrongful discharge and jurisdiction of that Claim was conferred on the Court of Claims by 28 U.S.C. 1491.

7. The writ should be allowed for the following reasons:

(1) The action is not barred by the Statute of Limitations. Exhaustion of administrative remedies was a prerequisite to accrual of cause of action.

> *Crown Coat Front Co., Inc. v. United States,* 386 US 503; *Harper v. United States,* 159 Ct. Claim 135; 310 F.2d 405.

It does not matter how long it takes to exhaust administrative remedies, the judicial claim does not accrue so as to start the statutory six year period running until those remedies have been exhausted. The statute itself so provides:

> "Unless the petition therein is filed within *six years after the claim accrues.*"

Until the case at bar the Court of Claims' precedents followed to its ultimate conclusion this court's holding in *Crown Coat Front Co., Inc. v. United States, supra* and had consistently ruled that however long it took to exhaust administrative remedies, until they had been exhausted the statute of limitations did not accrue.

This is best exemplified by the companion cases

> *Harper v. United States,* 159 Ct. Claims 135; 310 F.2d 405 (1962);
>
> and
>
> *Friedman v. United States,* 159 Ct. Claims 1; 310 F.2d 381 (1962).

In each case some 15 years had elapsed between the time when a veteran was discharged and the time when he filed his claim in the Court of Claims. In the one case, *Friedman, supra,* the veteran had had his Retiring board hearing before he was

discharged; in the other, *Harper, Supra,* he did not have his hearing until 15 years later. Following *Crown Coat Front Co., Inc. v. United States* held that a hearing granted on the eve of action in the Court of Claims in *Friedman supra* did not confer jurisdiction because the Claimant had had a prior hearing on discharge from the armed services 15 years earlier whereas a hearing on the eve of filing of Claim in Court of Claims in *Harper* did confer jurisdiction because he had not had a prior hearing and until he had had one his cause of action had not accrued so as to start the Statute of Limitations of 28 U.S.C. 2501 to run.

This court's opinion in *Crown Coat Front Co., Inc. v. United States* and the Court of Claims' own *Harper v. United States, supra,* demanded denial of the motion because those cases held that a cause of action for statute of limitations purposes does not accrue until all administrative remedies have been exhausted. In its brief opinion disposing of the action the Court of Claims did not advert either to *Crown Coat Front Co., Inc. v. United States, supra* or *Harper v. United States, supra.*

Although 5 U.S.C. 7501 flatly provides that no hearing need be granted to support a discharge both the Petitioner in stubbornly demanding a hearing and the Agency in finally granting him one correctly followed this court's holding by six of its justices in *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed.2d 15; 94 S.Ct. 1633 that, where the ground of the discharge is alleged commission of a crime or other moral turpitude, an administrative hearing at some time is mandatory. Accord, *Perry v. Sinderman,* 408 U.S. 593, 33 L Ed 2d 570, 92 S.Ct. 2694 and *Board of Regents v. Roth,* 408 U.S. 564, 33 L Ed 2d 548, 92 S Ct 2701.

The ultimate burden of the United States upon its motion for summary judgment was to establish that, if the same evidence were submitted on trial as was submitted on the

motion, a court would be required to grant United States a directed verdict.

> *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L Ed 967, 64 S.Ct. 724.

The ultimate evidence before the court was Petitioner's statement in his affidavit:

> "Nevertheless during the entire period from 1950 to 1974 I kept at trying to get my job back. During this period I continually met with officials of the U.S. Treasury Department *who assured me the case was still open.*"

The United States in its motion for summary judgment did not produce any affidavit or other proof that the foregoing statement was incorrect. In particular it did not produce any reply affidavit of Billy J. Brown or anyone else rebutting the affidavit of Dennis Pollutro or Felix Pollutro and undertaking to show what was the scope and purpose of the May 15, 1974 hearing. Plainly, the reception of additional evidence into the case file, the entertainment of oral argument on the matter, the reference of the record to an experienced hearing examiner to report, and the ultimate issuance of a written report and determination of September 24, 1974 was ample to establish a *prima facie* case that it was a "hearing" in the real sense of that word. Whatever the United States chooses to call it, all of the essential ingredients of a hearing were there. The inference to be drawn from those facts and from the fact that for 25 years the Petitioner had been trying to get this very hearing and had been continually assured by U.S. Treasury officials that the case was still open was for the trier of the fact and not for the summary judgment court.

(2) The Court of Claims was in clear error in deciding the Statute of Limitations issue adversely to the Petitioner. It was in even clearer error in even entertaining the question.

The record discloses that the administrative agency decided the question on its merits, not on the ground of the statute of limitations (Determination letter dated September 24, 1974 annexed to answering affidavit of Dennis Pollutro post P. 11).

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its actions are based."
>
> *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87; 87 L Ed 626, 633, 63 S Ct 454.

It is a fundamental rule of administrative law that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency as disclosed by the record. The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be adequately sustained or the action cannot be upheld, even though there are other grounds upon which the agency could have but did not base its action. If the grounds invoked by an administrative agency for its determination are inadequate or improper, a reviewing court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Since the Agency, in the case at bar, faced the merits and decided the case on its merits the Court of Claims was obligated to base its action on the same basis. Hence it was powerless to dismiss the action on the basis of the statute of limitations.

The special reasons which should impel this court to grant certiorari are:

(1) To decide once and for all whether 5 U.S.C. 7501 in permitting discharge of a permanent civil servant without a hearing is constitutional. This question was left open in *Arnett*

v. Kennedy, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633. Four dissenting justices in that case held that due process of law required a full scale evidentiary hearing before discharge and that 5 U.S.C. 7501 was *pro tanto* unconstitutional to the extent that it authorized a discharge without a hearing. Two concurring justices in the plurality opinion of the court held that due process of law requires a hearing and that 5 U.S.C. 7501 was *pro tanto* unconstitutional to the extent that it authorized a discharge without a hearing but that it sufficed for due process purposes for the hearing to be afforded after discharge and the three justice plurality opinion held that due process of law did not require a hearing at all. Since the case below had been decided upon summary judgment, the concurring opinion of the two justices who would hold that due process would be satisfied by a post discharge evidentiary hearing required return of the case to the district court for that post discharge hearing.

In the case at bar all petitioner wanted and was entitled constitutionally to have was a post discharge hearing.

(2) Petitioner's only forum was the Court of Claims. No appeal lies from its judgment except to this court by writ of certiorari. Where clear error has been shown this court should be more willing to grant certiorari than it would be if the Petitioner had had at least one opportunity of right for review as most petitioners for certiorari to this court have had.

The court should grant a writ of certiorari.

FRANCIS X. MURPHY,
Attorney for Petitioner,
914 Abbott Road,
Buffalo, New York 14220,
1-716-824-8558.

Administrative Order

SEP 24 1974

Dear Mr. Kemp:

This refers to the case of Mr. Felix J. Pollutro, who was removed from the position of Zone Deputy Collector, Buffalo, New York, effective July 8, 1949.

I regret that it has taken this long to reply to your most recent communications concerning Mr. Pollutro. However, the pressure of other work and our reluctance to provide a cursory review were responsible for the delay.

As we discussed in our meeting on May 15, 1974, we have reviewed the evidence presented orally by Mr. Dennis Pollutro during that meeting and the relevant case file in the context of his presentation. By your letter of May 28, 1974, you sent us the "new evidence" in written form.

In answer to your specific question of May 15, there are several pieces of evidence in the package you forwarded on May 28, which were not previously in our files. They are:

1. Letter dated November 20, 1973, from Mr. Thomas Cardin (Exhibit H);

2. Notarized statement dated November 30, 1973, from Michael L. Lovallo (Exhibit I);

3. Note to "Felix" (date not clear), from George McCowan, former collector of Internal Revenue (Exhibit K).

This evidence, the case file, and Dennis Pollutro's brief interpreting the evidence, as he sees it, have been reviewed and considered by one of the Service's experienced examiners of conduct cases. That examiner does not find that the new evidence of recent date is credible enough to outweigh the evidence received in 1949 close to the time where the in-

cidents in question occurred. Nor does he find that the current evidence affects the action taken by the Service in removing Mr. Pollutro. Rather, he finds that the weight of the evidentiary record, even when balanced against Mr. Dennis Pollutro's submission of May 28, clearly indicates the validity of the removal. In discussing his findings the examiner states:

> "Mr. Pollutro was removed from the Service in Buffalo, New York on charges of (1) solicitation of a bribe; (2) Acceptance of a bribe and (3) acceptance of a gratuity.
>
> Mr. Pollutro was indicted by a Federal Grand Jury for solicitation of a bribe from Mrs. Josephine Fiorella as set forth in Specification 1, Charge 1. This indictment was dismissed on May 29, 1950. Mr. Pollutro was also indicted, together with others, on a charge of conspiracy to commit an offense against the United States—solicitation of a bribe by an officer of the United States, attempted extortion and willful oppression under color of the law in connection with the tax liability of Dr. Herbert S. Coe. This indictment was dismissed on December 16, 1949. The Service's letter of charges did not cover the Coe case since the United States Attorney intended to seek a conspiracy indictment involving two other individuals and did not want the defense to know of his intention.
>
> Mr. Pollutro's case has been very carefully and independently considered on many occasions by officials of the Office of the Secretary of the Treasury and by officials of the Internal Revenue Service. The files indicate that six different Commissioners of Internal Revenue have reviewed this case as well as an Acting Secretary of the Treasury Department.
>
> There can be little doubt in anyone's mind the importance that the Internal Revenue Service places on integrity of its employees. Certainly the entire tax collection system would be in jeopardy if the Service's em-

> ployees were corrupt or presented a bad image to the taxpaying public. All of the employees of the Internal Revenue Service are constantly exposed to temptations greater than most Federal employees or employees in civilian capacities since the entire tax structure is based on voluntary compliance. Certainly the Service must employ persons in which this *full* confidence can be placed.
>
> It is fully understandable that Messrs. Felix Pollutro and Dennis Pollutro have been concerned and desirous of review of the actions taken in the Pollutro case. The record clearly establishes Mr. Pollutro's unfitness and unsuitability for retention of employment in the Internal Revenue Service.
>
> Much of the file is concerned with the criminal portion of the Pollutro case and it appears that many of the considerations asked for are based solely on the reputation of witnesses in the criminal action and that the criminal actions were dismissed. Therefore, it appears to be the contention that administratively the Service should not have separated Mr. Pollutro from his position.
>
> Certainly this position is not inconsistent because he was removed under administrative charges even though the criminal charges were dismissed. The Courts have consistently held that the fact that a person may have been acquitted of criminal charges of the same character as those which led to his removal does not make it mandatory or compel that he cannot be separated administratively for the good of the Service. This was clearly indicated in Craghan vs. the United States, 116 Court of Claims, 577, and was again more recently indicated in Finn vs. the United States. In reviewing these cases, the situation is very similar to the situation in the Finn case.
>
> It is my recommendation and finding after careful consideration that Mr. Pollutro occupied a position where

trust and integrity is demanded by the position and for the good will of the Internal Revenue Service. Mr. Pollutro's record clearly indicates his unfitness and unsuitability for retention or reinstatement or further consideration within the Service. The Court decisions previously cited and the overall voluntary compliance mission of the Internal Revenue Service could be seriously injured if any other action would be taken."

Since I have become Director, Personnel Division, I have had a thorough review made of this case on two occasions, including the present one directed at the "new evidence" and its possible impact on the removal action. As a result of these reviews, I have found no factual or evidentiary basis on which to question the previous conclusion, reached by a host of Service and Department level officials who have found the removal proper over the past twenty-five years.

While I can appreciate your sincere desire to be of assistance to Mr. Pollutro, in all candor I do not believe further review of this case by the Service or the Department is warranted.

Sincerely yours,

(signed) BILLY J. BROWN
Director, Personnel Division

Honorable Jack Kemp
House of Representatives
Washington, D. C. 20515

Order of United States Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

FELIX POLLUTRO,

v.

THE UNITED STATES.

No. 62-75.

Before DAVIS, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

ORDER

This case comes before the court on defendant's motion for summary judgment, filed July 14, 1975. From January 28, 1941, to January 28, 1949, plaintiff was a deputy collector of the Internal Revenue Service. He was suspended from employment for solicitation of a bribe and acceptance of a gratuity. On July 8, 1949, he was discharged from his position by the Internal Revenue Service.

Any cause of action that plaintiff may have had accrued as of July 8, 1949, his date of discharge. See *Friedman v. United States*, 159 Ct. Cl. 1, 310 F. 2d 381 (1962), *cert. denied*, 373 U. S. 932 (1963); *Middleman v. United States*, 91 Ct. Cl. 306 (1940). Plaintiff had six years to assert a claim. 28 U.S.C. § 2501 (1970). His claim was filed in this court on March 3, 1975.

Upon consideration of defendant's motion for summary judgment, plaintiff's response thereto, defendant's reply, and plaintiff's supplemental memorandum,

IT IS ORDERED that defendant's motion for summary judgment be and is hereby granted and that plaintiff's petition be and is hereby dismissed.

BY THE COURT

OSCAR H. DAVIS
Judge, Presiding

JAN 23 1976

Order of United States Court of Claims Denying Rehearing

IN THE UNITED STATES COURT OF CLAIMS

FELIX POLLUTRO,

v.

THE UNITED STATES.

No. 62-75.

Before DAVIS, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

ORDER

This case comes before the court on plaintiff's suggestion and motion, filed February 9, 1976, for a rehearing *en banc* pursuant to Rules 7(d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing, filed Feb. 9, 1976, be and the same is denied.

BY THE COURT

OSCAR H. DAVIS
Judge, Presiding

MAR 26 1976

Answering Affidavit of Dennis Pollutro for Plaintiff

United States Court of Claims

FELIX POLLUTRO,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 62-75.

State of New York, County of Erie. } ss.:

Dennis Pollutro being duly sworn deposes and says:

I am the son of the plaintiff, Felix Pollutro. On October 10, 1973 I secured an audience with John Shay, Appeals Examiner Personnel Division of Internal Revenue Service. At that audience both my father and I learned for the first time what was in the Internal Revenue Service's Administrative file on my father to his removal from service. John Shay told me that the contents of the file and the sole bases for his removal were:

affidavit of Josephine Fiorella, the taxpayer allegedly shaken down.

affidavit of Thomas Carden, her accountant

affidavit of Michael Lovallo

affidavit of James Mattina

I then asked Mr. Shay:

"Is that all of the evidence against my father"

Mr. Shay said: "Yes".

Now, when for the first time my father and I knew what it was in the administrative file that my father had to meet, he and I proceeded to get evidence either refuting the evidence in the administrative file or impeaching it. We secured affidavit from the accountant for one of the complaining witnesses that he had not been offered a bribe of any kind by my father and also from one of the other complaining witnesses. We secured impeaching evidence showing that the affidavit of Josephine Fiorella, a complaining witness was unworthy of belief. The only other charge was that my father had taken $15 from a taxpayer to help him prepare his tax return, three years before 1949 when my father was dismissed.

Armed with this new evidence I demanded and secured an audience on May 15, 1974 with Billy J. Brown, Director, Personnel Division of Internal Revenue Service. This was the culmination of 25 years efforts to answer charges made against my father.

In attendance were: Billy J. Brown, Lucille Smoot, his assistant, Congressman Jack Kemp and myself. After introductions, Mr. Brown told me to proceed. I had prepared a text of what I had to say and I asked for permission to read from that text. The permission was granted and I did so.

I also had with me at that time numerous exhibits which were referred to in the text of my statement and which I referred to in my oral presentation. At the conclusion of my reading of the brief Mr. Brown said:

"I want to first of all compliment you not only on the text of the brief but on the manner in which you presented it. I, of course, am going to reserve decision and I wonder if

you have brought with you copies of the brief and supporting documents today?"

My answer was:

"I am sorry, I do not have additional copies today but when I get home I will make copies and forward them to you."

Mr. Kemp said:

"I am going to be in my Hamburg (N.Y.) office in the next few days and I want to have a couple copies myself. Why don't you deliver them to my Hamburg office and I will have copies made and see that Mr. Brown gets one."

That is what I did.

Mrs. Smoot asked at the end of this audience:

"Just exactly what does Felix want?"

My answer was:

"He wants the record cleared, he wants his job back, he wants retirement from that job and he wants whatever back pay is involved."

About September 21, 1974, no decision having been received I spoke to Billy J. Brown by long distance telephone. I asked him for an early decision in view of the already 4 months that had gone by since May 15, 1974. Mr. Brown apologized for the delay and explained that an independent reviewer had been called in by Internal Revenue Service to go over the matter and that a decision was expected in a few days.

The ultimate decision denying all relief dated September 24, 1974 has been affixed to the Complaint herein but is annexed hereto as well for convenience.

This audience of May 15, 1974 and the related opportunity to make a reasoned presentation to a person having the authority to make a determination was the first and only opportunity that my father had to meet the evidence upon which Internal Revenue Service based its discharge.

Up until my meeting with John Shay on October 10, 1973 neither my father nor I knew what was in the administrative file and neither of us knew what was the evidence we had to meet in order to get his job back.

The instant action was begun by the filing of the complaint with this court on March 3, 1975, certainly a reasonable time after the date of final decision, September 24, 1974.

DENNIS F. POLLUTRO.

Subscribed and sworn to before me this 13th day of August 1975.

FRANCIS X. MURPHY,
Notary Public, State of New York,
Qualified in Erie County,
My Commission expires
Mar. 30, 1977.

Answering Affidavit of Felix Pollutro to Motion of United States for Summary Judgment

IN THE UNITED STATES COURT OF CLAIMS

FELIX POLLUTRO,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 62-75

State of New York, County of Erie. } ss.:

FELIX POLLUTRO being duly sworn deposes and says:

I am the plaintiff. I was employed by the Internal Revenue Service from January 28, 1941 to January 28, 1949. I served creditably during that period, receiving annual official ratings of very good. I was a permanent, non probationary civil servant. I never did an act that was other than in the highest interest of United States. I was absolutely and completely loyal to my trust as a civil servant.

On January 28, 1949 I was called into the office by George McGowan, the Collector of Internal Revenue in Buffalo, New York. There I was handed the statement of charges of solicitation which is annexed to the complaint herein. I answered these charges completely. I was indicted by the grand jury for conspiracy. Although this conspiracy is not one of the grounds for dismissal, the Internal Revenue agents in charge

of handling the conspiracy told me that in fact was one of the reasons for my suspension, that they did not want to tip off other defendants in the criminal conspiracy.

I testified voluntarily and fully before the grand jury, readily waiving the privilege against self incrimination. Without awaiting the outcome of the trial of the indictments and without any hearing to ascertain where the truth lay I was discharged on July 8, 1949. In December 1949 the first of the two indictments was tried, the conspiracy indictment. The United States did not have enough evidence even to get to the jury against me and the judge dismissed the action against me. In May 1950 the United States dismissed the remaining indictment, the one charging the identical conduct of which I was accused in the letter of charges.

I immediately applied to get my job back and then the run around began. I applied to Washington D.C. office of Internal Revenue Service and they told me they had no objection to my rehiring but the actual rehiring had to come from the Collector in Buffalo New York. I applied to the Collector in Buffalo New York and he told me that I had to apply to the Regional Office in New York City. I applied to the Regional office in New York City and they told me I had to be reappointed by Washington or Buffalo.

I enlisted the assistance of my congressmen and my New York State senators. I went with them to responsible officials of the U.S. Treasury. I was told by the Treasury that my case was open and no final decision had been made.

All this time I was just a layman. I could not possibly understand how it could be that having been exonerated of all charges why I should not be reemployed. Nevertheless during the entire period from 1950 to 1974 I kept at trying to get my job back. During this period I continually met with officials of the U. S. Treasury who assured me that the case was still open. During this entire time I did not know exactly what was

the real reason for the discharge. I was refused permission to examine the administrative file in the case and the Treasury would not tell me what was the actual evidence it had of any wrongdoing on my part. The only accusations of wrongdoing put in writing by United States was the administrative charges and the two indictments.

My son, Dennis Pollutro, during this entire period of time was helping me to get my job back. Finally he told me of his success in finally getting to meet John Shay of Internal Revenue Service and learning from him what was the evidence against me. I have read his affidavit of today's date. I state that after he told me of what were the results of his interview with Mr. Shay he and I proceeded to get the evidence to meet it.

Annexed is a letter dated October 29, 1973 to United States Senator James Buckley. It refers to several reviews of my reemployment and that case was open as recently as December 22, 1972. I state that at no time was I ever told there was going to be any review, at no time was I ever given any opportunity to take part in any such review of the evidence against me, I did not know such review was taking place, if it did take place, I never saw the evidence against me. Any such "reviews" were meaningless as far as I was concerned. However the document is important as showing that my case was still open administratively.

It was just about this time that my son, Dennis Pollutro succeeded in getting the audience with John Shay of Internal Revenue Service that is referred to in his affidavit.

Thereafter continued efforts were made to get a hearing at which the evidence against me in the Government's file could be refuted. These efforts culminated in the audience my son had with Billy J. Brown that is recited in his affidavit of this date. The outcome of that audience, the referral of the entire file to an Examiner for the Internal Revenue service, that

Examiner's decision and the approval of that decision by Billy J. Brown in his letter decision dated September 24, 1974 is contained in said decision annexed to the complaint herein.

Until September 24, 1974 no final decision in my case had been made as is shown by the said decision itself.

FELIX I. POLLUTRO.

Subscribed and sworn to before me this 13th day of August 1975.

FRANCIS X. MURPHY,
Notary Public, State of New York,
Qualified in Erie County,
My Commission expires
Mar. 30, 1977.

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1828

In the Supreme Court of the United States

OCTOBER TERM, 1976

FELIX POLLUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1828

FELIX POLLUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

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On July 8, 1949, petitioner was discharged by the Internal Revenue Service from employment as a deputy collector for solicitation of a bribe and acceptance of a gratuity. He did not take a timely appeal to the Civil Service Commission. On March 3, 1975, nearly twenty-six years later, petitioner instituted this action in the Court of Claims. The Court of Claims held that petitioner's action was barred by the six-year period of limitations prescribed by 28 U.S.C. 2501 (Pet. App. 13-14).

On May 15, 1974, petitioner's Congressman and his son had met with the Director of the Personnel Division of the Internal Revenue Service to describe alleged new evidence and to request reconsideration of the dismissal. Shortly thereafter, they delivered to the Service a package containing that evidence. The Service then submitted the case file, the evidence, and a brief for petitioner to an experienced examiner of "conduct" cases (Pet. App. 9).

The examiner concluded that the 1949 dismissal had been justified (Pet. App. 10-12). On September 24, 1974, the Director transmitted this conclusion to the Congressman and advised that he agreed with it (Pet. App. 9-12).[1]

Petitioner contends that the meeting of May 15, 1974, was petitioner's initial administrative hearing concerning his discharge, that the Director's letter of September 24, 1974, was the final administrative decision, and that his cause of action for monetary compensation in the Court of Claims did not accrue until that decision. However, a cause of action for wrongful discharge from a non-probationary civil service position accrues at the time of dismissal, unless the employee takes a timely administrative appeal or presents evidence legally sufficient to excuse his failure to do so. *Group* v. *United States*, 165 Ct. Cl. 612, 615-616; *Friedman* v. *United States*, 310 F. 2d 381, 386-387 (Ct. Cl.); *Middleman* v. *United States*, 91 Ct. Cl. 306. Petitioner had not pursued a timely administrative appeal to the Civil Service Commission or presented evidence justifying his failure to exhaust his administrative remedies. Petitioner's failure to pursue available remedies did not postpone the accrual of his cause of action or toll the statute of limitations for monetary relief in the Court of Claims. Cf. *Soriano* v. *United States*, 352 U.S. 270. Nor, contrary to petitioner's contention, does informal discretionary reconsideration by

[1]The Director stated (Pet. App. 12):

> Since I have become Director, Personnel Division, I have had a thorough review made of this case on two occasions, including the present one directed at the "new evidence" and its possible impact on the removal action. As a result of these reviews, I have found no factual or evidentiary basis on which to question the previous conclusion, reached by a host of Service and Department level officials who have found the removal proper over the past twenty-five years.

the agency and reiteration of its prior decision revive the cause of action that has been extinguished by expiration of the limitations period.[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

[2]Petitioner incorrectly suggests (Pet. 4) that *Friedman* v. *United States*, *supra*, and *Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.), are to the contrary. In those cases, the court held that a cause of action for military disability retirement pay does not accrue until the disability claim is denied administratively. Claims for such retirement pay are governed by a statutory scheme that is designed to provide compensation for service-connected disabilities which may be unknown to the serviceman for years after his separation. To effectuate this scheme, the cause of action for retirement pay has been construed as arising upon the final determination of the service board which initially passes upon the disability claim, after the claimant has brought that claim to the agency's attention. In contrast, since the cause for dismissal from the civil service must be clearly set forth at the time (5 U.S.C. (1946 ed.) 652(a); cf. 5 U.S.C. 7501), the cause of action arises at the time of dismissal. Cf. *Soriano* v. *United States*, *supra*, 352 U.S. at 274-275; *Friedman* v. *United States*, *supra*.